

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 24 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | 2 CA-CR 2010-0048-PR |
| |) | DEPARTMENT A |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| MIGUEL EDWARD RUEDA, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20062768

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Law Offices of Erin E. Duffy, P.L.L.C.
By Erin E. Duffy

Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 A jury found petitioner Miguel Rueda guilty of third-degree burglary and theft of a means of transportation by controlling a stolen vehicle. After the parties stipulated that Rueda had one historical prior felony conviction, the trial court sentenced

him to concurrent, enhanced, presumptive sentences, the longer of which is 6.5 years. Rueda appealed his convictions and sentences, and this court affirmed. *State v. Rueda*, No. 2 CA-CR 2007-0168 (memorandum decision filed Aug. 12, 2008). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court summarily denied, giving rise to the present petition for review. We will not disturb the trial court's summary denial of post-conviction relief absent a clear abuse of the court's discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007); *see also State v. Freeland*, 176 Ariz. 544, 552, 863 P.2d 263, 271 (App. 1993) (it is for trial court to determine, in exercise of its discretion, whether defendant has raised colorable claim warranting evidentiary hearing).

Discussion

¶2 In his petition for post-conviction relief, Rueda argued the trial court had “erred in accepting [a] Stipulation to Admit Historical Prior Conviction without following the procedures outlined in Rule 17.6, [Ariz. R. Crim. P.]”¹ He maintained the court had “failed to conduct the proper colloquy” and contended “[n]othing [else] in the record definitely proves the existence of the alleged prior conviction” so that his sentence should be vacated. The court ruled that, because the issue could have been raised on appeal but was not, Rueda was “precluded from seeking post-conviction relief on [that] ground[.]”

¹Rueda also argued in his petition that trial counsel had been ineffective in failing to introduce him to prospective jurors and in failing to present evidence of his “special learning needs.” The trial court rejected this claim, and Rueda does not challenge that portion of the court's ruling on review.

¶3 On review, Rueda maintains the trial court abused its discretion in finding the issue precluded. We disagree. As the trial court ruled, with a few exceptions not applicable here,² a defendant is precluded from relief in a Rule 32 proceeding based on any ground that is “[r]aisable on direct appeal” or “has been waived at trial, on appeal, or in any previous collateral proceeding.” Ariz. R. Crim. P. 32.2(a).

¶4 In this case, Rueda did not argue on appeal that the trial court had improperly enhanced his sentence based on his stipulated prior felony conviction. Instead, he now maintains, as he did in his reply below, he could not have raised this argument on appeal and the trial court therefore abused its discretion in finding the issue precluded under Rule 32.2(a). He argues that “Rule 32.1 . . . provides that any ‘person who pled guilty or no contest,’ has a right to file a post-conviction relief proceeding” and that his “Stipulation to Admit Historical Prior Conviction was the equivalent of . . . pleading guilty to the allegation of prior conviction and as such, entitled [him] to post-conviction review.”

¶5 Rueda cites no authority to support his implied proposition that a stipulation to a prior conviction is the equivalent of pleading guilty to criminal charges and cannot be challenged on appeal under A.R.S. § 13-4033(B).³ In fact, this court has

²Rule 32.2(b) provides that “Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h).” Rueda’s claims below were not based on any of these subsections.

³Although he does not cite § 13-4033(B) in his petition for review, in his reply to the state’s response to his petition below, he maintained he did not have a right to appellate review of his stipulation because it was “the equivalent of a plea agreement” and was therefore not appealable under § 13-4033(B).

rejected this argument. In *State v. Medrano-Barraza*, 190 Ariz. 472, 473-74, 949 P.2d 561, 562-63 (App. 1997), we concluded “[§] 13-4033(B) does not bar defendant from seeking appellate review of a sentence following a trial and an admission of a prior conviction.” *Id.* at 474, 949 P.2d at 563. Thus, because Rueda could have raised the issue on appeal and did not, the trial court did not abuse its discretion in finding it precluded.

¶6 Additionally, in his reply to the state’s response to his petition for post-conviction relief, Rueda argued that, if the court found his sentencing claim precluded because it could have been raised on appeal, then appellate counsel had been ineffective in failing to raise it. In the reply, he also moved to “amend the Petition for Post-Conviction Relief to include an allegation of ineffective assistance of appellate counsel.” He did not, however, challenge appellate counsel’s effectiveness in his petition for post-conviction relief.

¶7 When the trial court ruled on his petition, it did not address the issue. Rueda then moved for reconsideration, requesting the court “grant relief on the issue of whether or not appellate counsel was ineffective for failing to raise the validity of the Stipulation . . . on appeal.” Concluding the issue had been waived, the court denied the motion, stating that Rueda had “failed to raise th[e] issue in the original Petition . . . and only brought it up later in a Reply which the State had no opportunity to respond to.”

¶8 On review, Rueda contends the trial court “erred” by not allowing him to amend his petition for post-conviction relief to include a claim of ineffective assistance of appellate counsel. Rule 32.6(d) provides that “[a]fter the filing of a post-conviction relief

petition, no amendments shall be permitted except by leave of court upon a showing of good cause.” Although “Rule 32.6(d) adopts a liberal policy toward amendments of post-conviction pleadings,” *State v. Rogers*, 113 Ariz. 6, 8, 545 P.2d 930, 932 (1976), the rule also requires a showing of “good cause,” Rule 32.6(d). Rueda cited no cause whatsoever in his reply. And, as the trial court pointed out, issues raised for the first time in a reply in a Rule 32 proceeding are waived. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d 1052, 1054 (App. 2009). Thus, the court did not abuse its discretion in denying Rueda’s motion to amend his petition or in refusing to address his belated assertion that appellate counsel had been ineffective.

Disposition

¶9 Finding no abuse of the trial court’s discretion in summarily dismissing Rueda’s petition, we grant review but deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge